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In the Supreme Court of the United States

OCTOBER TERM, 1956

GRANT E. HAYES,
vs. Petitioner,
UNITED STATES OF AMERICA,

RONALD J. McDONALD,
vs. Petitioner,
UNITED STATES OF AMERICA,

GRANT E. HAYES,
vs. Petitioner,
UNITED STATES OF AMERICA,

RONALD J. McDONALD,
vs. Petitioner,
UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners Grant E. Hayes and Ronald J. MacDonald respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled cases November 17, 1956.

Opinions

There was no opinion in the District Court. The opinion of the Court of Appeals has not been reported and is set forth in the Appendix hereto. The opinion of the Court of Appeals in the first appeal is reported at 227 Fed. (2d) 540.

Jurisdiction

The judgment of the Court of Appeals was entered on October 16, 1956 (infra, Appendix A, p. 24). A petition for rehearing was denied on November 17, 1956 (Cir. Ct. R. p. 29). The jurisdiction of this Court is invoked under the provisions of 28 USCA 1254 (1).

Questions Presented

1. Whether it was error to admit into evidence a corporate income tax return when an act of Congress (infra, Appendix B, p. 32) provided that such return should not be considered as a return for any purposes of the Internal Revenue Code, or in the alternative to admit into evidence, over objection that it was a violation of the privilege against self-incrimination, a new return for the same year which was required to be filed anew by the said Act and which was offered as evidence of the falsity of the original return.

2. Whether the allegations of the indictment are sufficient to charge a violation of 26 U.S.C.A. 145(b), (1939 Code) or constitute only a violation of 26 U.S.C.A. 3616(a) (1939 Code).

3. Whether the bias and prejudice of the Court manifested throughout the trial constituted a denial of due process of law to petitioners.

4. Whether, upon a second appeal, the Court of Appeals can adhere to its ruling on the sufficiency of the evidence made on the first appeal and disregard any substantial evidence favorable to the defense received in the second trial and its affect on the question of wilfullness and the sufficiency of the evidence with respect thereto.

5. Whether, in cases involving charges of wilful attempts to evade taxes where the evidence of intent is circumstantial, it is error to refuse to give in substance a requested instruction to the effect that the evidence must not only be consistent with the inference of guilt but inconsistent with every reasonable hypothesis of innocence.

Constitutional Provisions and Statutes Involved

The constitutional provisions and statutes involved are the "due process of law" clause of the 5th Amendment to the Constitution of the United States, 26 U.S.C.A 145(b) and 26 U.S.C.A. 3616(a) (1939 Internal Revenue Code), and Section 305 of Act of January 3, 1951, c 1199, Title III, 64 Stat. 1220, 26 U.S.C.A. 53, all of which are set out in Appendix B, infra, pp. 24 to 32.

Statement of the Case

Petitioners Grant E. Hayes and Ronald J. McDonald were president and secretary respectively of the Grant E. Hayes Company, a corporation engaged in the business of buying and selling new and used cars, parts and accessories (T. 167). Three indictments charging violations of 26 U.S.C.A. 145(b) are involved, each containing four counts. In two of them Hayes and McDonald were separately charged with wilful attempts to defeat and evade a large part of their own indi-

vidual income taxes by filing false individual income tax returns for four separate years. In the third indictment petitioners were jointly charged with wilful attempts to evade taxes of the Grant E. Hayes Company by filing false corporate income tax returns for four separate years (Tr. 7-14).

The cases were consolidated for trial and following conviction on the first trial, Hayes was sentenced to imprisonment for 18 months and was fined $10,000.00. McDonald was fined $2,500.00 and received a similar sentence of imprisonment (Tr. 16-20). On appeal the Court of Appeals reversed and remanded the cases for new trials, solely upon the ground that the Court gave erroneous instructions as to the jury's consideration of character evidence (227 Fed. (2d) 540). Upon retrial, both petitioners were again convicted on all counts (Tr. 45-46). This time the court sentenced each to imprisonment for two years on each count, the sentences on seven of the eight counts on which each of the petitioners was convicted were made to run concurrently with each other. The sentence on the eighth count was made to run consecutively with the other counts, but execution of sentence on this count was suspended as to both petitioners and each was placed on probation for a period of five years, said period of probation to commence at the termination of the imprisonment or any period of parole that might be granted. Hayes was fined $30,000.00 ($3,750.00 on each count) and McDonald was fined $15,000.00 ($1,875.00 on each count.) The court directed that both be imprisoned until the fines were paid or until otherwise discharged as provided by law (Tr. 49-53). On appeal the judgments were affirmed (infra, Appendix A, page 24).

1. *The admissibility of evidence issue*:

The fourth count of the indictment charging petitioners with the alleged attempt to evade taxes of the Grant E. Hayes Company involved the corporate return for the fiscal year ending September 30, 1950 which was filed December 15, 1950. The original return filed reported a corporate tax due of $5,247.57 (T. 13). This return was received into evidence over objection of petitioners (T. 62), based upon the following considerations:

The excess profits tax had expired and was not reinstated by Congress until January 3, 1951. The tax as reinstated was made retroactive to June 30, 1950, and the Act required that corporations whose taxable year ended after June 30, 1950, but prior to December 31, 1950, should file a new return for such taxable year, and provided that no return for such taxable year filed on or before the date of the enactment of the Act (Jan. 3, 1951) should be considered as a return for any of the purposes of the Internal Revenue Code (Appendix B, page 32). Since this Act provided that the aforementioned corporate return (filed December 15, 1950) was no return for any of the purposes of the Internal Revenue Code, its introduction into evidence as a return to prove the allegations of this count was objected to by petitioners (T. 62).

Pursuant to and as required by the Act, another return for the year in question was filed by the Grant E. Hayes Company showing a total tax due of $23,205.28 (T. 223). The government offered this refiled return into evidence to prove the falsity of the first return. Since the trial court received the first return in evidence, the introduction of the refiled return was objected to on the grounds that, since it had to be refiled pursuant to an Act of Congress, its use as evidence by

the government was compulsory self-incrimination (T. 62). The question presented related to the admissibility of either or both of these two returns.

2. *The sufficiency of the indictment issue*:

The counts of all three indictments charged petitioners with violation of 26 USCA 145(b). The wording in each count was in the usual form and to the effect that the person or persons charged "did wilfully and knowingly attempt to defeat and evade a large part of the taxes due and owing" to the United States by filing "a false and fraudulent income tax return" wherein they understated the net income and the tax due thereon in varying amounts for each of the years in question. No other act than that of filing a false return was alleged to spell out the "attempt" (T. 7-14). The case was retried before the Supreme Court decision in Berra v. United States, ... U. S. ....., 100 L. Ed 563, was announced. The specific question as to the sufficiency of the indictments to charge a violation of Sec. 145 (b) was not raised in the trial court and was raised for the first time on appeal, but the court of appeals declined to decide the issue on the ground that the question was not properly before it. (Appendix A, p. 28).

3. *The denial of due process of law issue*:

Prior to the second trial, petitioners, moved by misgivings that they would not receive a fair and impartial trial from the same trial judge, filed a motion for a change of judge. The motion was denied (T. 26-27). During the second trial the trial judge repeatedly examined witnesses on his own initiative, stopped the petitioners on their examination and cross-examination of witnesses when no objection was imposed by the

government, on occasion directed the attorney for the government as to his interrogation of witnesses, frequently asked him to explain the significance of evidence before the jury, and generally conducted the prosecution from the bench (T. 64-68, 72-74, 77-81, 84-89, 96-101, 103-106, 108-109, 111-112, 114-115, 117-119, 121, 123, 124, 126, 128-129, 145). During the trial, when petitioners objected to certain testimony offered by the government as not the best evidence and when it appeared that the government had not subpoenaed the necessary records, the court recessed the trial, called counsel into chambers and advised counsel for petitioners that if counsel was going to insist on the best evidence rule, the court would require counsel for petitioners to have every record needed by the government in court by the time court convened the next morning and specifically identified as to record, page and line, or the court would permit secondary evidence to be given by the government witness. (See affvaidits (T. 3, 4, 5). On the morning of the fourth day of trial, a Friday, counsel for petitioners advised the court that the defense would probably rest its case that afternoon and requested that the court defer argument until Monday morning so argument and instruction could be given at the same time. The court stated it would do so (T. 4) but upon conclusion of the case, required argument to proceed late Friday afternoon, then recessed court until Monday morning at which time the court instructed the jury (T. 185-186). In its instructions, (T. 186-196) given some sixty hours after argument, the court reviewed the government's theories and evidence of the case, but said not a word about the evidence or theories of defense of petitioners, although exception was taken to such failure. Following conviction, the court in imposing sentence the second time, increased the prior sentences six months, added

a five year probationary sentence, and increased the fine originally imposed on Hayes by three times the original fine and on McDonald by six times the original fine (T. 16-20, 49-53). In doing so the court stated the case was more aggravated than it appeared on the first trial (T. 204). The records will not so show. The Court of Appeals dismissed the issue of bias and prejudice by saying "we find no merit in this contention." (Appendix A, p. 29).

4. *The sufficiency of the evidence issue*:

On the first appeal the Court of Appeals said that "there was an abundance of evidence to sustain the verdict." (Appendix A, p. 26). On the second trial petitioners placed into evidence, or insisted that the government place into evidence under the best evidence rule, several documentary exhibits (Exhibits 71, 72, A, B, C, D, O and P. T. 105-107, 241-243, 245) not offered at the first trial. Such evidence, together with testimony concerning the same, not only tended to show a lack of wilfullness, but also to prove that several items relied upon by the government in both trials did not constitute unreported income.

On the second appeal approximately one-half of petitioners' brief was devoted to the question of the sufficiency of the evidence introduced at the second trial including that not offered at the first trial. The matter was presented in detail, setting out a complete analysis of the government's evidence. It demonstrated that on at least one of the counts no additional tax was due and on another only about $8.00 additional tax was due. The brief also pointed out that many of the government's alleged items of unreported corporate income were not in fact items that constituted unreported income. This was not done on the first appeal. The second appeal presented

the facts in a light much more favorable to petitioners than on the first appeal.

The Court of Appeals dismissed consideration of the question on the second appeal in these words:

"No contention is made that the evidence on the second trial was more favorable to the defendants than on the first."

On the petition for rehearing, several erroneous statements of fact concerning the evidence made by the government in its brief on both appeals were brought to the attention of the appellate court. It was also specifically contended that new evidence was received and that the evidence on the second trial was much more favorable to petitioners than was contended upon the first appeal. Again the court refused to reconsider the question.

5. *The instruction regarding circumstantial evidence issue*:

There was no direct evidence of wilfullness in the case and proof of wilfullness was based upon circumstantial evidence. The petitioners requested the court to instruct the jury that circumstantial evidence must point so unerringly to the guilt of a defendant as to exclude every other "reasonable hypothesis" (T. 44). The court refused to give said instruction or to incorporate the substance thereof in the instructions given (T. 192-194).

ARGUMENT ON REASONS FOR GRANTING WRIT

1. As relates to the first question presented for review, the Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court. This question relates to the effect to be given to

Section 305 of the Act of January 3, 1951, c. 1199, Title III, 64 Stat. 1220, 26 U.S.C.A. Sec. 53. (For text of Act see Appendix page 32).

Count 4 of the indictment against the defendants Hayes and McDonald, as President and Secretary, respectively of Grant E. Hayes Company, charges defendants with willfully and knowingly attempting to defeat and evade a large part of the taxes due and owing by the Hayes Corporation for the fiscal year, October 1, 1949 to September 30, 1950 by means of filing a false return on or about December 15, 1950 (T. 13).

As a necessary part of the government's proof of fraud on such count, there was offered and admitted in evidence, over defendant's objection (T. 62) Exhibit 22, the corporate return filed on or about December 15, 1950 (T. 221). Thereafter, over objection of defendants (T. 62) Exhibit 23, the refiled 1950 return, was introduced and received in evidence. Defendants' objections to Exhibit 22, the original 1950 return, were based upon said Section 305 above referred to and particularly that part thereof reading as follows:

> "The return required by this section for such taxable year shall constitute the return for such taxable year for all purposes of the Internal Revenue Code; and no return for such taxable year, with respect to any tax imposed by Chapter 1 of such code (chapter 1 of this title) filed on or before the date of the enactment of this Act (Jan. 3, 1951) shall be considered for any of such purposes as a return for such year."

The objection to Exhibit 23, the refiled return for 1950 (T. 223) was upon the ground that it constituted self incrimination since defendants were required by law to file the same. The Circuit Court held there was no merit to defendants' contention (Cir. Ct. R. Page 5).

The purpose of Section 305 is readily apparent. The excess profits tax had expired and was not reinstated by Congress until January 3, 1951. The tax as reinstated was made retroactive to June 30, 1950, and in order to deal with corporations with fiscal years ending between June 30, 1950 and December 31, 1950, Congress required such corporations to refile their returns so that they could include therein any excess profits tax which might be owing.

Congress could not have been more explicit in disposing of the effect of the original return when it provided that the refiled return should be considered the return "for all purposes of the Internal Revenue Code" and that the prior filed return shall not be "considered for any such purposes as a return for such year."

The largest single item in the government's case was the difference between the tax payable as described by the original 1950 return (Exhibit 22) and the refiled 1950 return (Exhibit 23). As pointed out, the refiled return was not an amended return voluntarily filed. It was a new return for the same period, which the law compelled defendants to file, and the failure to do so would constitute a criminal offense. When the original return was filed the defendants believed it to be accurate and correct. By the time the law required them to file the new return they had become aware of errors in the first return and knew there was additional corporate income which should be reported. This was accurately reported on the refiled return and an addition tax of $17,957.75 was paid therewith, which when added to that paid with the original return totaled $23,205.28 or $2,893.18 more than the amount which the indictment claimed should have been paid. Had defendants filed the same information on the new return as was on the

first return, in the light of the information which they had at the time of filing the new return, they would have been guilty of filing a false return under the new filing. They should not be, and Congress surely did not intend, that defendants be placed in such position. As stated in Sushan v. United States, 117 Fed. (2d) 110:

> "So the maker of an income tax return under oath, if he does not wish to disclose any fact which may tend to incriminate him, ought to withhold it unless specifically forced thereto. Otherwise his disclosures ought to be esteemed voluntary."

In the case now before the Court these defendants were required to file the new return and were forced to place upon the face of the return the net income for the corporation for the fiscal period concerned as they then knew it to be. The government then based its charge on the first return and used the second return as evidence that the first return was false. This is compulsory self-incrimination of the clearest kind. It was evidently in an attempt to prevent this sort of situation that the Congress enacted the provision above cited to the effect that the first return should not be a return for any purposes within the Internal Revenue Code (and certainly 145(b) is part of the Internal Revenue Code).

It seems obvious that Congress saw the dilemma which taxpayers would face, and in order to prevent a situation which would violate the 5th Amendment to the U. S. Constitution, Congress required the filing of a new return but provided that no criminal charge could be made or based upon the return first filed. We submit that the language and provisions of Section 305 are clear in that regard.

While it is true that Exhibit 22 and 23 related to only one count in the three indictments, yet all of the indictments

were tied together and the essence of each was the willful attempt to defeat the income tax. Evidence on the crucial issue of wilfulness was not separated so that the jury could determine defendants' mental state for each count in each indictment. Since defendants were found guilty on all twelve counts which comprised the three indictments, it is not possible to say that the wilfulness which might have been found as a result of considering Exhibit 22 and 23 together did not influence the jury in their finding that the defendants were guilty on every count brought by the government.

As stated in Little vs. United States, 73 Fed. (2d) 861:

> " * * * * where error occurs which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. So to hold would, as a practical matter, take from a defendant his right to a fair trial * * * . The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

This doctrine was approved in McCandless vs. United States, 298 U.S. 342, 347-8 (1936); see also Bihn v. United States, 328 U.S. 633, 638-9 (1946) and Fiswich vs. United States, 329 U.S. 211 91 Lawyers Edition 196.

2. The second question submitted presents an important question of federal law which has not as yet been determined by this Court. It is predicated upon the holding of this Court in the case of Berra vs. United States, 100 Lawyers Edition 563, decided April 30, 1956, wherein the question was discussed but not decided as to whether a person charged with filing a false income tax return with intent to evade a substantial part of his income taxes may legally be charged, convicted, and sentenced under Section 145(b), Title 26 U.S.C.A. The de-

fendants in this action were so charged, convicted, and sentenced.

At the trial the defendants moved for judgment of acquittal on the grounds that the evidence was not sufficient to prove the offense charged (T. 198-199), however, not specifically mentioning the grounds as herein urged. On appeal this question was presented to the Court of Appeals. That Court declined to consider the matter, stating in referring to the Berra case:

> "In view of the Supreme Court's reluctance to approach the question when not properly before it, we shall do likewise. Under these circumstances we are reluctant to speculate on what the decision of the Supreme Court will be when the question is properly presented, particularly when the contention now raised, if sustained, would cut the heart out of Section 145(b) (Cir. Ct. R. 7).

In Berra vs. United States in the trial court, the only question presented by the defendant was whether or not the jury should have a choice as to which statute, if either, would apply to the defendant's acts. As indicated above, the defendants in the case now before the Court did move for judgments of acquittal on the grounds that the evidence was not sufficient to prove the offense charged, namely, violation of Section 145(b). This Court in the Berra case held that the acts complained of did clearly fall under the language of both Sections 145(b) and 3616(a), and because of the manner in which the question was raised, declined to consider the question as to whether the sentence and conviction were lawful. Nevertheless, the minority opinion pointed out clearly that the felony conviction could not be valid under Section 145(b) in view of the fact that such Section and the misdemeanor Section 3616(a) proscribe identical proof for conviction under either,

and hence there is no clearly defined penalty for the specific conduct complained of. There does not seem to be any basic difference between the majority and the minority opinion except procedurally.

Spies vs. United States, 317 U. S. 492, 87 Lawyers Edition 419, involved the relationship between Section 145(b) and 145(a). Section 145(a) makes it a misdemeanor to wilfully fail to make a return or pay a tax, whereas, as pointed out above, Section 145(b) makes it a felony to wilfully attempt, in any manner, to evade or defeat any tax. The court held that were it not for the existence of Section 145(a) failure to file a return would come within the provisions of Section 145(b). The language of the Court in this regard is as follows:

> "Had Section 145(a) not included willful failure to pay a tax, it would have defined as misdemeanors generally a failure to observe statutory duties to make timely returns, keep records, or supply information—duties imposed to facilitate administration of the Act even if, because of insufficient net income, there were no duty to pay a tax. It would then be permissible and perhaps an appropriate construction of Section 145(b) that it made felonies of the same wilful omissions when then was the added element of duty to pay a tax."

The Court went on to hold, however, that in view of the existence of Section 145(a), offenses falling within that statute were in effect carved out from the operation of Section 145(b). The conviction was reversed. Exactly the same situation prevails here.

We submit that under the reasoning of the Berra and Spies cases, it is clear that one of two situations exist, namely, (a) that the filing of a false return with intent to evade income taxes, being within the terms of Section 3616(a) is carved

out of Section 145(b) even though it would otherwise be a violation of that Section; or (b) that by reason of the two sections proscribing identical proof but different punishments, there is no clearly defined conduct and punishment prescribed. In either event, it seems clear that the conviction under Section 145(b) should not be legally upheld.

Where such a grave and important constitutional question is presented, so seriously affecting the rights and liberties of citizens, and which question is certain to occur and reoccur time and time again until settled, we submit that this Court should brush aside any possible technical or procedural blocks and fully determine the matter.

3. The fair and impartial administration of criminal justice in federal courts requires that this court exercise its supervisory powers to review a denial of the constitutional right to due process of law by a biased and prejudiced trial court. After going through one trial that was reversed upon appeal, petitioners, being fearful that they would not receive a fair and impartial trial before the same trial judge, moved for a change of trial judge. The motion was denied (T. 26-27). Such fears were not groundless. The record manifests the determination of the trial judge that petitioners be again convicted.

The very substantial increase of the sentences imposed following conviction on the second trial shocked the bar and people of Utah and was interpreted everywhere as being an additional punishment to petitioners for having appealed and obtained a reversal after the first trial. The review of the case by this court thus becomes important, particularly to the people of Utah, for if the trial court is upheld in its conduct in these cases, not only will it give the trial court further license to assume a role of prosecutor, but future defendants convicted

in the trial court below will be fearful of exercisng their right to appeal lest a successful appeal will mean a more severe punishment.

True, the sentences imposed were within the statutory limits and petitioners do not now take the position that following reversal of a conviction on appeal that the trial court should be limited to the sentence first imposed. But in this case, prison sentences were increased, the fines imposed on Hayes were increased three times from $10,000.00 to $30,000.00 and those imposed on McDonald were increased six times from $2,500.00 to $15,000.00, and in addition, five year probationary sentences following imprisonment were added. This unconscienable increase evidences the strong bias and prejudice of the court against petitioners.

To one not present at the trial, the bias and prejudice of the court must be shown by the cold facts of the printed record. The conduct of the court as set out in the statement of facts is found in that record. To sustain such conduct will be to deny due process of law to these petitioners and jeopardize the fair and impartial administration of criminal justice for the future.

It is a fundamental concept of "due process of law" that parties to a controversy are entitled to have their issues determined by an impartial tribunal. (Lee v. Fleming, 158 F2d 984, Cert. den. 67 S. Ct. 1186, 331 U.S. 805, 91 L Ed. 1826). A trial by a biased judge is not in conformity with due process of law. (National Labor Relations Board v. Ford Motor Co., 114 F2d 905, Cert. den. 61 S. Ct. 621, 312 U.S. 689, 85 L.Ed. 1126). The accused is entitled to be tried by a fair and impartial judge, who shall maintain his role of judge and not

assume the role of prosecutor. (U. S. v. Domres, 142 F2d 477, Cert. den. 65 S. Ct. 55, 323 U.S. 723, 89 L. Ed. 581).

These are sound principles that must be preserved. The difficulty of trying a case in an atmosphere of bias and prejudice is evident to all who have had such an experience. In this era of complicated tax laws, which at times confound the best minds of our judicial system, the importance of preserving the rights of the individual charged with tax evasion to a fair and impartial trial, by a judge and before a jury, takes on added significance.

The Court of Appeals found only that the court "was interested in having some complicated matters explained in such a manner that they would be clear to court or jury." (Appendix A, p. 29). Did the trial court have that interest when it repeatedly interfered with petitioners' examination of witnesses without any objection to such examination by the prosecution, or when it demonstrated more interest in the government proving its case than it did in the best evidence rule, or in compelling argument more than sixty hours before it intended to submit the case to the jury, or in its one-sided instructions to the jury? In sustaining this conduct, the court of Appeals sanctions a far departure from the accepted and usual course of judicial proceedings.

4. In the second trial of these cases, a substantial amount of new material evidence was introduced on behalf of petitioners that was not used in the first trial. New additional counsel was brought into the case and on the second trial it was and can be mathematically shown that much of the government's evidence accepted as proof of unreported income on the first trial did not in fact show unreported income. The additional new evidence and these new and corrected con-

cepts of the government's evidence and its failure to show unreported income were brought to the attention of the Court of Appeals on the second appeal in a detailed analysis of all the evidence. But the Court of Appeals disregarded it by a baseless observation that no contention was made that the evidence was more favorable to appellants than on the first appeal (Appendix A, p. 26). The more favorable position of the evidence and petitioners' contentions with respect thereto, together with several erroneous statements of material facts made by the government in its briefs on both appeals, were again brought to the attention of the Appellate Court by the petition for rehearing. Again the Court of Appeals disregarded it.

Individual rights should not be dismissed so lightly. Trials and appeals in trials of this nature are costly. But cost is of little significance when petitioners' liberty and reputation are at stake and American citizens fail to receive a fair hearing from our federal courts. Appeal is a matter of right in our judicial system. That right carries with it the right to have appellate courts consider matters raised on appeal on facts established in the trial on which the appeal is taken. We asked only for a fair consideration of our case in the Court of Appeals. We did not receive it. It is imperative that this Court, in the exercise of its powers of supervision of lower courts, not permit a Court of Appeals to disregard new facts and new evidence in considering any case on a second appeal.

5. With regard to the fifth question presented for review, we suggest that the decision rendered in this case by the Court of Appeals, Tenth Circuit, is not only in conflict with the decisions of the others Courts of Appeals with regard to the same subject, but is inconsistent with prior decisions of the Court of Appeals of the Tenth Circuit relating thereto.

The question presented relates to what instructions should be given in cases involving charges of willful attempts to evade taxes where the evidence of intent is circumstantial. Relying upon the cases of Magan, v. U. S., 159 F (2d) 85; Isabell v. U. S., 227 Fed. 788, Leslie v. U. S., 43 F (2d) 288, and Parnell v. U. S., 64 F (2d) 324, the defendants assumed that the rule in the Tenth Circuit should require the trial court to submit an instruction upon the so-called "reasonable hypothesis" rule. In line with that, the defendants requested the court to instruct as follows:

> "Certain evidence has been introduced by the Government which is largely circumstantial and as such may be used as a basis for your findings only if it measures up to the standards required by law. Such circumstantial evidence must point so unerringly to the guilt of a defendant as to exclude every other reasonable hypothesis, and each of the circumstances must be proved to your satisfaction beyond a reasonable doubt. These circumstances must be consistent with each other and inconsistent with any other hypotheses except the guilt of the defendant.
>
> "If, therefore, upon a consideration of all the evidence, you find there exists a reasonable hypothesis which might indicate the defendant's innocence, in the absence of direct evidence satisfying you beyond a reasonable doubt of the defendant's guilt, then I instruct you to find the defendants 'not guilty'." (T. 44).

The court not only failed to give the instruction requested but refused to give the substance of the instruction. At no time did the Court instruct the jury that it was their duty to reconcile the circumstantial evidence with the hypothesis of innocence if it could be so reasonably reconciled. The court rather instructed the jury in effect that all that was necessary was the filing of a false return, without regard to the numerous

circumstances presented in evidence which would indicate there was no intent to defraud. (T. 192-194).

It seems that there has for some time been a conflict in the rule followed in the various Circuits as regards the weight and effect to be given circumstantial evidence and as to what instructions should be given relating thereto in criminal cases. It is our understanding that the "reasonable hypothesis" rule had always been followed in the First (Enrique Rivera v. U.S., 57 F(2) 816; the Third (U. S. v. Tatcher, 131 F(2) 1002; U. S. v. Laffman, 152 F(2) 393; the Fifth (Bryan v. U. S., 175 F (2) 223); the Sixth (Epstein v. U.S., 174 F (2) 754; Dawes v. U. S., 177 F (2) 255); the Seventh (U. S. v. Fenwick, 177 F(2) 488); and the Tenth Circuits (Magan v. U. S. Supra; Isabell v. U. S. Supra; Leslie v. U. S. Supra; and Parnell v. U. S. Supra); and that the substantial evidence rule had been followed in the Second (U. S. v. Spangnuolo, 168 F(2) 768, Cert. denied 335 U. S. 824); the Fourth (Jelaza v. U. S., 179 F(2) 202); the Eighth (Schuermann v. U. S., 174 F(2) 397, Cert. denied 338 U. S. 831); the Ninth (Barcott v. U.S., 169 F(2) 929, Cert. denied 336 U. S. 912); and the District of Columbia Court of Appeals (Curley v. U. S., 160 F(2) 229, Cert. denied 331 U. S. 837).

In the case now before the Court the instructions of the trial court did not meet either the reasonable hypothesis rule or the substantial evidence rule, but totally ignored any instruction requiring the jury to take into consideration evidence submitted on behalf of the defendants going to the question of their intent and the reasons and state of mind underlying any acts which they did in connection with the filing of their returns. Whether the Court of Appeals of the Tenth Circuit has now abandoned the reasonable hypothesis rule cannot be

determined from the opinion rendered. The important fact remains that what the rule concerning circumstantial evidence of intent ought to be should be decided by this Court.

We strongly urge that this court should resolve the conflict in the rule existing in the various Circuits, and set down a proper and uniform rule to be followed by the United States District Courts and Courts of Appeal throughout the United States as relates to circumstantial exidence of intent in criminal cases.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari issue out of this Court to the Court of Appeals for the Tenth Circuit in this matter.

Respectfully submitted,

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PROOF OF SERVICE

We, ZAR E. HAYES and BRYANT H. CROFT of counsel of record for appellants and members of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of December, 1956, we served, on behalf of appellants herein, copies of the foregoing Petition for Writ of Certiorari as follows:

1. On the United States by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah at Room 200 Federal Building, Salt Lake City, Utah, and by mailing a copy in a duly addressed envelope with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D.C.

.....

ZAR E. HAYES

.....

BRYANT H. CROFT
Of Counsel of Record for Petitioners

APPENDIX "A"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

GRANT E. HAYES, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee. — Number 5347

RONALD J. McDONALD, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee. — Number 5348

Appeals from the United States District Court For The District of Utah, Central Division

GRANT E. HAYES, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee. — Number 5349

RONALD J. McDONALD, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee. — Number 5350

Calvin L. Rampton and Byrant H. Croft, of Salt Lake City, Utah, (Zar E. Hayes and William G. Mulligan, Salt Lake City, Utah, were with them on the brief), for Appellants;

C. Nelson Day, Assistant United States Attorney, Salt Lake City, Utah, (Charles K. Rice, Assistant Attorney General, Joseph M. Howard, Attorney, Department of Justice, and A. Pratt Kesler, United States Attorney, Salt Lake City, Utah, were with him on the brief), for Appellee.

BEFORE HUXMAN, MURRAH, and PICKETT, United States Circuit Judges.

PICKETT, Circuit Judge.

These appeals are from judgments and sentences following the conviction of the defendants on three indictments charging them with wilfully and knowingly attempting to defeat and evade income taxes by filing and causing to be filed false and fraudulent returns, in violation of Sec. 145(b) of the Internal Revenue Code of 1939, (26 U.S.C.A. Sec. 7201, 1954 Code). The indictments were in four counts, each charging violations for the years 1947, 1948, 1949, and 1950, and were in connection with the personal income tax returns of the defendants and the corporate returns of Grant E. Hayes Company, of which the defendant Hayes was President, and the defendant McDonald was Secretary. The cases were consolidated for trial, and the defendants were first tried and convicted on each count of the three indictments. On appeal from the judgment and sentences, we reversed and remanded the cases for new trials, solely upon the ground that the court gave erroneous instructions as to the jury's consideration of character evidence. 227 F. 2d 541. Upon retrial, the defendants were again convicted on all counts of the indictments, and were duly sentenced upon such convictions. Several assignments of error are now urged, some of which were considered on the first appeal.

A considerable portion of appellants' brief is devoted to the sufficiency of the evidence to sustain the verdict. It is conceded that the evidence on the second trial is substantially the same as that of the first trial. On the former appeal, we said that "there was an abundance of evidence to sustain the verdict." No contention is made that the evidence on the second trial was more favorable to the defendants than on the first. The record discloses that there was some additional evidence in the second trial tending to support the charges. As

to the sufficiency of the evidence, we adhere to the views expressed in our former opinion.

It is also urged that we reconsider our conclusion as to the admissibility of the corporation's income tax return for the year 1950. Sec. 305 of the Act of January 3, 1951, 64 Stat. 1220, 26 U.S.C.A. 53, 1939 Code, requires corporations subject to the Act to file amended returns for the year 1950, and that no return for such taxable year with respect to any tax imposed by Chapter 1 of such Act filed on or before its effective date "shall be considered for any such purposes as a return for such year." For the reasons stated in the opinion on the former appeal, the exhibit was admissible.[1]

For the first time, the defendants contend in this Court that the indictments do not charge, and the evidence does not establish, facts constituting a violation of Sec. 145(b). This section provides, in part, that "any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony. * * * ". Sec 3616(a) of the Internal Revenue Code of 1939, (26 U.S.C.A. Sec. 7207, 1954 Code), provides that whenever any person

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1. In the opinion of the first appeal, 227 F. 2d 541, 542-3, we said:

"The offense of filing a fraudulent return for the purpose of evading income taxes is complete when the accused wilfully filed a false return, and as stated, there is nothing in the Act of January 3, 1951, indicating that by the passage of that Act Congress intended to wipe out or forgive such offenses. Had the original income tax return for the year 1950 not been admitted, the Government would have been unable to establish that a false and fraudulent return had been filed with respect to revenue not affected by Section 305 of the Act of January 3, 1951. The original corporation income tax return for the year 1950 was properly admitted in evidence." (Footnote omitted).

delivers to the collector "any false or fraudulent list, return, * * * with intent to defeat or evade the valuation, enumeration or assessment intended to be made; * * * shall be fined not exceeding $1,000, or imprisoned not exceeding one year, * * * ".

Referring to the language of the Supreme Court in Berra v. United States, 351 U. S. 131, and the rule of Spies v. United States, 317 U.S. 492,[2] the appellants say that the end result of these decisions is that a prosecution cannot be had under Sec. 145(b) for the filing of a false and fraudulent income tax return to evade or defeat taxes, and the prosecutions for the filing of such returns are limited to Sec. 3616(a). It is urged that we consider this question for the first time on appeal because of clear error affecting the substantial rights of the parties. Ordinarily, in criminal cases where substantial rights of a defendant are affected, we would not hesitate to consider the question, although not previously raised. However, the Supreme Court, in the Berra case, had the identical question before it and did not exercise its right to consider the question even though the defendant in that case had been sentenced to a term of four years under Sec. 145(b), which was three years more than a sentence permitted under Sec. 3616(a)[3].

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2. The Spies case held that the willful omission to file a return and pay a tax as defined in Sec. 145(a), a misdemeanor, cannot be made the basis for a violation of Sec. 145(b), which makes it a felony to wilfully attempt to evade or defeat income tax.

3. In holding that the only question before it was that of a failure to give an instruction, the Supreme Court in the Berra case, 351 U.S. 131, 132-3, said: "No motions addressed to the validity of the indictment, judgment of conviction, or sentence under Sec. 145(b) were made before, during, or after trial, * * * ". The defendant did, however, offer an instruction which referred to the right to convict under either Sec. 145(b) or Sec. 3616(a). In the case here, liability under Sec. 3616(a) was not called to the attention of the trial court in any manner.

In view of the Supreme Court's reluctance to approach the question when not properly before it, we shall do likewise. Under these circumstances, we are reluctant to speculate on what the decision of the Supreme Court will be when the question is properly presented, particularly when the contention now raised, if sustained, would cut the heart out of Section 145(b).[4]

The record discloses that the defendants filed twenty requests for instructions. The failure to give some of these instructions, or the substance thereof, is assigned as error, specifically those dealing with circumstantial evidence, reasonable doubt, and intent. At the conclusion of the Court's instructions to the jury, the defendants took exception to certain instructions given, and stated that they further excepted to the failure of the Court to give a substantial portion of the requested instructions, referring to them only by number. Federal Rules of Criminal Procedure, Rule 30, provides in part that "no party may assign as error any portion of the charge or omission therefrom, unless he objects thereto before the the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury." This portion of the rule is substantially the same as that of Rule 51 of the Federal Rules of Civil Procedure. The clear purpose of these rules is to require the objecting party, after the Court's instructions have been given, to call particular attention to errors in instructions and to state

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4. The effect of the Berra decision on prosecutions under Sec. 145(b) was recently considered by the 2nd Circuit in two cases. Felony sentences for filing false returns with intent to evade taxes were sustained. United States v. Moran, ... F. 2d.; H. J. K. Theatre Corp. et al. v. United States, ... F. 2d .....

the grounds therefor. This permits the correction of any error in instructions given or refused before the jury retires. We have repeatedly held that the correctness of instructions will not be reviewed on appeal unless the objection is made before the jury retires to consider its verdict,[5] in which objection the grounds must be stated distinctly. Jones v. Koma, Inc., (10 Cir.) 218 F. 2d 530; Solorio v. Atchison, T. & S Fe R. Co., (10 Cir.) 224 F. 2d 544. We have also held that in making objections, reference to instructions by number does not meet the requirements of the rule. Garden City v. Burden, (10 Cir.) 186 F. 2d 651. See also Lloyd v. Thomas (9 Cir.) 195 F. 2d 486; Marshall v. Nugent, (1 Cir.) 222 F. 2d 604; Hansen v. St. Joseph Fuel Oil & Mfg. Co., (8 Cir.) 181 F. 2d 880, Cert. den. 340 U. S. 865. Because of the nature of this case, we have given careful consideration to the instructions as a whole, including those relating to intent and reasonable doubt, and we are satisfied that they adequately and fairly stated the law as it related to the facts of these cases, and none of them is clearly erroneous, and the jury was not misled in any respect.

Finally, the defendants assert that the conduct of the trial judge during the trial of the case, by his comments, manner, and demeanor, prejudiced the rights of the defendants and prevented them from having a fair trial. We find no merit in this contention. While the Court did at times question the witnesses and counsel for both parties, we find no indication of prejudice toward either side. The most that can be said is that the Court was interested in having some rather difficult and involved matters explained in such a manner that they would be clear to the Court and the jury. It is said that this

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5. We do mean by this that the jury must be in the jury box when the objections are made, but they must be made before it retires to consider its verdict.

bias and prejudice is manifested by the Court's action in giving greater sentences and fines upon the second conviction than on the first. The Court gave as the reason for these different penalties his belief that the conduct of the defendants was more aggravated than he thought after the first trial. The fixing of penalties for crimes is a Congressional function, and what constitutes adequate punishment is ordinarily left to the discretion of the trial judge. If the sentence is within the statutory limit, appellate courts will not interfere unless clearly cruel and unusual. Rose v. United States, (10 Cir.) 128 F. 2d 622, cert. den. 317 U. S. 651; Edwards v. United States, (10 Cir.) 206 F. 2d 855. The sentences imposed were not cruel and usual.

Affirmed.

APPENDIX "B"

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Amendment V

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * * "

26 U.S.C.A. Section 145(b) (INTERNAL REVENUE CODE 1939)

"Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

26 U.S.C.A. SECTION 3616(a) (INTERNAL REVENUE CODE 1939)

"Whenever any person — (a) Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * * he shall be fined not exceeding $1,000 or be imprisoned, not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

SECTION 305 OF ACT JANUARY 3, 1951, C. 1199, TITLE III, 64 STAT. 1220, 26 U.S.C.A. SEC. 53, 1939 CODE.

"In the case of a corporation subject to the tax imposed by sub-chapter D of chapter 1 of the Internal Revenue Code (sub-chapter D of Chapter 1 of this title) for a taxable year ending after June 30, 1950, but prior to December 31, 1950, such corporation shall after the date of the enactment of this Act (Jan. 3, 1951) and before March 15, 1951, make a return for such taxable year with respect to the tax imposed by chapter 1 of the Internal Revenue Code (chapter 1 of this title) for such taxable year. The return required by this section for such taxable year shall constitute the return for such taxable year for all purposes of the Internal Revenue Code; and no return for such taxable year, with respect to any tax imposed by chapter 1 of such code (chapter 1 of this title) filed on or before the date of the enactment of this Act (Jan. 3, 1951) shall be considered for any of such purposes as a return for such year. The taxes imposed by chapter 1 of such code (chapter 1 of this title) (determined with the amendments made by this Act) for such taxable year shall be paid on March 15, 1951, in lieu of the time prescribed in section 56 (a) of such code (section 56(a) of this title). All payments with respect to any tax for such taxable year imposed by chapter 1 of such code under the law in effect prior to the enactment of this Act, to the extent that such payments have not been credited or refunded, shall be deemed payments made at the time of the filing of the return required by this section on account of the tax for such taxable year under chapter 1 (chapter 1 of this title) determined with the amendments made by this Act."

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